No. 13,141

IN THE

United States Court of Appeals

For the Ninth Circuit

FIBREBOARD PRODUCTS INC., a Corporation, et al.,
Appellant,

vs.

W. H. TOWNSEND,
Appellee.

Opening Brief of Appellant Fibreboard Products Inc.

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SUBJECT INDEX

CASES

STATUTES

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JURISDICTION

This is an appeal from a final judgment of the District Court for the Northern District of California, Southern Division, entered on September 20, 1951 (34-5).* Notice of appeal was filed on October 3, 1951 (36).

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*References to pages of the transcript are shown by the page numbers in parentheses: ( )

Exhibits are referred to by appropriate letter or number following the designation of plaintiff or defendant: (P-) or (D-).

Page of the record for an exhibit is shown by page number preceding the letter indicating whose exhibit is referred to, with the letter or number of the exhibit following: (P-).

The District Court exercised jurisdiction in this matter pursuant to the provisions of Title 28, U.S.C., Sec. 1332, and by virtue of the facts that appellant Fibreboard Products Inc. (defendant below) is a Delaware corporation and appellee (plaintiff below) is a citizen of the State of California and the amount in controversy exceeds $3,000.00, exclusive of interest and costs (First Amended Complaint, 7-12).

This Court has jurisdiction pursuant to the provisions of Title 28, U.S.C., Sec. 1291.

STATEMENT OF THE CASE

I. Nature of Case Raised by the Pleadings.

Plaintiff filed this action seeking damages for breach of an alleged oral and written employment contract with defendant Fibreboard entered on October 18, 1948, at Antioch, California. Plaintiff alleged that the employment was to be as a recovery operator at defendant's San Joaquin Division plant at the rate of $1.725 per hour, for so long as plaintiff should desire to be employed and for so long as his work should be satisfactory. The employment was also alleged to be commenced upon the completion of the plant and to be continuous and permanent. Plaintiff further alleged that it was agreed that it would be necessary for him to remove from Tuscaloosa, Alabama, to Antioch, California, and that, in consideration of plaintiff's acceptance of employment and removal to Antioch, defendant would pay the reasonable cost of transportation of plaintiff and his family. Plaintiff alleged that he did transport himself and family to California and that in order to do so he had to sell his household furnishings and effects and that upon

arrival in Antioch he had to rent housing accommodations more expensive than those he left in Alabama. Plaintiff alleged that the plant was ready for operation in October, 1949, that he was qualified to perform the work agreed upon, and that he offered to go to work on November 2, 1949, and was refused employment (First Amended Complaint, 7-12).

Defendant generally denied that any contract was entered and affirmatively alleged that employment had been offered plaintiff on or about August 31, 1949, which plaintiff refused. Defendant further affirmatively alleged that the contracts alleged by plaintiff are invalid and unenforceable in that they are not in writing and subscribed by the party to be charged or by his agent (First Amended Answer, 18-20).

By its answer and by the proof defendant raised questions as to the existence of any contract, as to the enforceability of the alleged contract or contracts, on various grounds, and as to a refusal by plaintiff of an offer of performance by defendant if any contract existed.

II. Specification of Errors Relied Upon.

Appellant's statement of points on which it intends to rely on this appeal are set forth at pages 231-4 of the record. They are 19 in number, but may be summarized as follows:

1. The District Court erred in entering judgment for plaintiff and in failing to enter judgment for defendant.

2. The District Court erred in holding that the parties entered any contract, oral or written or oral and written.

3. The District Court erred in holding that defendant agreed to employ plaintiff as a recovery operator.

4. The District Court erred in failing to hold that the parties discussed employment of plaintiff by defendant orally and in writing without entering a contract and that no contract was entered due to the pendency of defendant's investigation of plaintiff's qualifications and due to the fact that negotiations were not completed.

5. The District Court erred in failing to hold that even if an agreement had been entered it was unenforceable due to its uncertainty, due to the fact that it was terminable at will, due to lack of mutuality in that plaintiff reserved a right to terminate at any time, and due to the fact that there exists no memorandum signed by the party to be charged to satisfy the requirements of the statute of frauds.

6. The District Court erred in failing to hold that defendant offered plaintiff employment, which offer discharged any obligation it may have had, and further that plaintiff failed to minimize damages by accepting employment offered him by defendant.

7. The District Court erred in holding that the parties agreed that plaintiff would remove himself from Tuscaloosa, Alabama, to Antioch, California.

8. The District Court erred in failing to hold that plaintiff left temporary employment in Alabama and removed himself and his family to Antioch, California, and paid his expenses for such moving and disposed of his furniture and belongings at his own risk and for his own purposes and not in reliance upon or in consideration of any promise, contract or agreement for permanent employment by defendant or its agents.

9. The District Court erred in holding that defendant breached a contract of employment with plaintiff and that

plaintiff has performed things and matters on his part to be performed and that defendant failed to perform things and matters on its part and in failing to hold that defendant has performed all things and matters on its part to be performed.

III. The Essential Facts.

In 1948 defendant was constructing a new plant, called San Joaquin Division, near Antioch, California, a few miles from another plant known as Antioch Division (120) which it had operated for many years. Of a contemplated 68 employees in the department known as the pulp mill it was planned to hire all but 25 locally and the rest from out of the state (146-7). Among other methods of obtaining a list of applicants from which it could select qualified employees for the pulp mill and the other departments it placed an anonymous advertisement in two issues of a trade journal called Southern Pulp & Paper Manufacturer (190). The trade journal circulated generally in the Southern states, where part of the pulp and paper industry is located and where some applicants might be found. Among the many responses to the advertisement was a letter from plaintiff (39 P-1) dated August 26, 1948, which was accompanied by a recommendation (72 P-5) dated February 1, 1944.

Correspondence ensued between plaintiff and defendant, including defendant's reply to the first letter (41 P-2) dated September 1, 1948, plaintiff's second letter (90 D-A) dated September 7, 1948, the accompanying application of the same date (93 D-B), and a letter to plaintiff (45 P-3) dated October 19, 1948.

The documents just enumerated, either singly or collectively, were found by the District Court to constitute a

written contract for permanent employment or at least the written portion of the "oral and written permanent contract of employment" (Findings, 31). An examination of the documents fails to reveal any mutual understanding that plaintiff was hired or was agreed to be hired for any particular job or at all. Plaintiff's letter of August 26 made application for "one of the jobs" at the new plant (39). The letter of recommendation is immaterial as it could not have formed part of a contract between these parties. Defendant's letter of September 1 enclosed an application blank and specifically cautioned plaintiff that the company was not making any commitments. Plaintiff's second letter (90 D-A) stated that he would appreciate "any job you people have to offer me." The application form submitted with the letter asked the kind of work desired and plaintiff had replied: "Pulp mill tour foreman" (93 D-B).

The next document was a letter to plaintiff written after plaintiff had telephoned the plant. The subject of the letter appeared immediately after plaintiff's name and address, as follows:

> "*Possibility* of Employment in Recovery Department." (Emphasis supplied.)

The body of the letter made no mention of any permanent employment. It advised that the plant would begin operations about the 1st of March (4½ months later) and warned of the critical housing situation. It held out one hope to plaintiff, i.e., that he could obtain temporary work at another mill if it were *his desire* to come to the coast earlier than March (45 P-3).

In none of the documents is there an offer to employ plaintiff or an acceptance of his application for permanent

employment by defendant as a *recovery operator*. There is no evidence in these documents, the only documents in the record which could possibly be the written contract, to support the finding of the District Court that the parties entered a written contract for permanent employment of plaintiff as a recovery operator on or about October 18, 1948, or at any other time.

The plaintiff was the only witness on his behalf and an examination of his testimony, disregarding all conflicting testimony, reveals no support for the finding of the District Court that an oral contract for permanent employment was entered on October 18, 1948, or at any other time. Plaintiff testified that he made application for a tour foreman's job (142). This apparently referred to the application (93 D-B) which accompanied (and contradicted) the letter in which he stated that he would take *any job that was offered*. Plaintiff further testified that he made a telephone call to Mr. Lindley, the pulp mill superintendent at the new plant on October 18, 1948. That telephone call furnished the date which the District Court apparently considered to be culmination of contract negotiations. Nowhere in plaintiff's testimony concerning that conversation or in Mr. Lindley's testimony concerning that conversation is there any evidence of an agreement to hire plaintiff in a permanent job as a recovery operator. On the contrary the record shows that the *job of recovery operator was not mentioned* in that conversation by either person. Plaintiff said that Lindley told him he would be placed in another plant until he could be used if he "wanted *a position*" (43). (Emphasis supplied.) Plaintiff also testified Lindley told him he could depend on "it" to be a permanent job (43). According to

plaintiff's later testimony, the *first* time that any agreement to hire him as a recovery operator could have been made was on November 15, 1948, the day when plaintiff presented himself at the plant in Antioch and applied for a job (95). By that date he had already moved himself and his family to California. He asserted in his testimony that at that time Lindley told him he could "pick out any job you want in the pulp mill," to which he replied that he would "apply for a recovery operator's job" (54, 55). Plaintiff later said that on the 15th of November he was "assigned as a recovery operator" (71).

On cross-examination plaintiff was shown the original Complaint, which he had verified and in which it was alleged that defendant had agreed on October 18, 1948, to employ him as a recovery operator for an indefinite time. After observing that allegation plaintiff stated:

> "There was nothing said about recovery operator until the 15th of November when I arrived at the San Joaquin plant" (95).

Plaintiff was cross-examined about the details of the October 18 telephone conversation with Lindley to determine whether there had been an agreement to hire him in a particular job in that conversation. The testimony was as follows (96-7):

> "Q. (By Mr. Holmes): When did Mr. Lindley say anything to you about the job as recovery operator?
>
> A. On the 15th of November.
>
> Q. He didn't say anything about the recovery operator's job in your telephone conversation?
>
> A. No, sir; he told me Mr. Stitt had given him my recommendation from the North Carolina Pulp Company and my application for employment and it seemed I was an experienced Kraft pulp mill man.

Q. He didn't promise you any particular job at all?

A. That's right.

Q. You didn't know what it would be?

A. Presumably it would be a tour foreman's job. That was the last job I had.

Q. Which was what you applied for?

A. Yes, sir.

Q. That is what you wanted?

A. That is what I wanted.

Q. He didn't promise you that or any other job on October 18th? [73]

A. No, sir; he just told me if I would come down they would place me in one of the other mills until such time, and that I could work in that until it was open, and I could stay here and the company would help me buy a home if I wasn't able to buy one."

Plaintiff testified that Lindley told him in the October 18th telephone conversation that the defendant would refund his transportation expense (43) and would help him buy a house (96). Lindley denied both statements (115, 116).

The subject of payment for plaintiff's transportation was not raised by him when he arrived in California nor for months afterwards (100). Plaintiff testified that Mr. Stitt, Manager of the San Joaquin Division, promised him the transportation refund the following August (68), but this was directly denied by Stitt (181, 201).

The District Court must have credited the denials as no finding was based on plaintiff's claim either for transportation or help in buying a house.

Lindley testified that he made no promise to or agreement with plaintiff in the telephone conversation other

than that he would endeavor to find plaintiff temporary work at another mill while his qualifications and references were investigated to determine whether he would be hired at the new plant. Lindley denied that the telephone conversation concerned any particular job (116), which denial is in accord with plaintiff's own testimony.

The asserted promises to help plaintiff buy a house and to refund transportation expense were not seriously contended for. Like the alleged contract for employment they lacked any definiteness and certainty.

The bulk of the remaining record concerns plaintiff's conversations and activities after his arrival in California. The most important testimony concerns the offer to plaintiff of a job as a broke (waste) baler operator.

In the summer of 1949 plaintiff asked Lindley to employ him so he could qualify as a delegate to a convention and was refused (123). Late in August, when the new plant was nearly ready to open, he telephoned Lindley again to ask about employment (59). He met Lindley pursuant to the telephone call and was told at that time that he was not going to be employed in Lindley's department (62, 125-7). His application remained on file and he was referred to another department head, Mr. Fuller, a few days later (216, 222). Fuller offered him the baler operator job on or about August 31. Plaintiff informed Fuller that he already had a higher paying job and effectively refused the offer (65-6, 97, 174, 175, 183, 185, 222-4). He did so despite his knowledge that the job he held at the Antioch Division was only temporary, pending a determination of whether he would be employed at the San Joaquin Division (60). The District Court failed to make a finding on this issue.

ARGUMENT

I. Summary of the Argument.

The issues presented here all relate to basic principles of contracts. The evidence in the record fails to provide the essentials of a valid, enforceable agreement in several particulars.

It is elementary that the proof must show a definite and certain mutual understanding between the parties, but none was proved in this case.

A contract must impose mutual obligations to be enforceable, but this alleged contract was terminable at any time by the plaintiff without his incurring any liability.

Similarly, a contract which is for an indefinite time is terminable at the will of either party without liability except for performance already rendered. The District Court was of the opinion that some consideration other than the agreement to work was furnished by this plaintiff, making the last mentioned principle inapplicable, but leaving a temporary job is not recognized as adequate consideration under the California cases and the evidence shows that plaintiff moved to California because of his *own desire* and not at the request of defendant.

Finally, the alleged contract is legally only an oral contract and is unenforceable because a contract for permanent employment, if for a consideration other than the services, is incapable of performance within one year and there is no writing signed by the party to be charged, or his agent, sufficient to satisfy the requirements of the statute of frauds.

There can be no doubt that this contract, alleged to have been made in California and certainly performable in California, is to be construed under the laws of that state.

II. No Contract Existed Due to Uncertainty as to Terms.

The law is established beyond cavil that the terms of a contract must be certain and definite. The reason for the rule lies, of course, in the necessity for mutual assent to the undertaking of each party—the meeting of the minds. Where the contract is incomplete, uncertain and lacking in essential terms, no action will lie for its breach. This doctrine was stated by the California Supreme Court in *Talmadge v. Arrowhead R. Co.,* 101 C. 367, 371, 35 P. 1000, and *Van Slyke v. Broadway Ins. Co.,* 115 C. 644, 47 P. 689, 690, 928. It has been repeated by other appellate courts in *Nelson v. F. A. Levy Co.,* 26 C.A. 367, 147 P. 1058; *Wineburgh v. Gay,* 27 C.A. 603, 605, 150 P. 1003; *Chas. Brown & Sons v. White Lunch Co.,* 92 C.A. 457, 461, 208 P. 490; *Sarina v. Pedrotti,* 103 C.A. 203, 208, 284 P. 472, and *Blake v. Mosher,* 11 C.A.2d 532, 54 P.2d 492.

In addition to these authorities, there is the well-known case of *Mason v. Rose,* 176 F.2d 486, frequently cited for its discussion on conflicts of laws, in which the United States Court of Appeals for the 2nd Circuit applied California law to a contract of joint venture, entered in England to be performed in California. In that case a long and detailed letter under which Mason was to perform services was held to be too indefinite in essential terms to be a valid contract.

The doctrine was recently discussed in *Goehring v. Stockton Morris Plan Co.,* 93 C.A.2d 417, 209 P.2d 41. At page 420 the Court said:

> "This court, in *Sarina v. Pedrotti,* 103 Cal. App. 203, 208 [284 P. 472], quoting from Talmadge v. Arrowhead R. Co., 101 Cal. 367, 371, held [35 P. 1000]: 'It is well settled that no action will lie to enforce the per-

formance of a contract, or to recover damages for its breach, unless it be complete and certain; * * *'

"This court, in *Blake v. Mosher,* 11 Cal. App. 2d 532, 535 [54 P.2d 492], quoted from 13 Corpus Juris, page 263, as follows: 'In order that there may be an agreement, the parties must have a distinct intention common to both, and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement, * * *' It also quoted 6 California Jurisprudence, page 43, where it is said: 'There can be no contract unless the minds of the parties have met and mutually agreed. Consent is not mutual unless all parties agree upon the same thing in the same sense,' and page 216, where it states: 'A contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained; an indefinite contract cannot be enforced because the courts cannot know to what the parties agreed.'

"In Reymond v. Laboudigue, 148 Cal. 691, 694 [84 P. 189], the court quoted with approval the following from 26 American and English Encyclopedia of Law (2d ed.), page 33: 'The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know what the parties agreed. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof.' Also, see *Wineburgh v. Gay,* 27 Cal. App. 603, 605 [150 P. 1003]."

The case of *Townsend v. Flotill Products, Inc.,* 82 C.A.2d 863, 187 P.2d 466, throws additional light on the question

of the existence of a contract in this case. It was there held that negotiations constituting an agreement to enter into a contract at a future date are not binding. On the evidentiary quality of plaintiff's testimony here the opinion is particularly pertinent (p. 866):

> "Before the court can say that an express contract is proven, there must be something more than the deductions or conclusions of the witness from the words used."

The application of the doctrine of these cases is readily apparent. Plaintiff alleged in his complaint that a contract was entered to employ him as a recovery operator. That is a specific job in the recovery department of the pulp mill. The District Court made a finding in accordance with the pleading, to the effect that the oral and written discussions culminated in a binding contract on October 18, 1948. The evidence, however, shows *without any conflict* that the position of recovery operator was never mentioned by the parties in their correspondence or discussions. The evidence shows without contradiction that the position of recovery operator was not the subject of any discussion until November 15 when, according to the plaintiff, he selected the job. He asserted he was offered his choice at that time because all of the salaried positions were filled. We are at a loss to understand how the District Court reached its conclusion in the absence of *any* evidence that the job as recovery operator was discussed on or prior to the date when the alleged contract was entered.

That the designation of the particular job is an essential element of the contract of employment is a point that hardly needs laboring. There are several types of jobs in the re-

covery department and dozens more in the plant as a whole. If the employment contract were not for a job as recovery operator, then it must be for none at all or for any available job. Plaintiff chose to base his case on the contention that a specific job was agreed to, but he failed to prove it. If he had contended that the agreement was for any job, type and nature unspecified, his argument would have been just as untenable, for his refusal of the job of broke baler operator furnishes a complete defense, as is more particularly developed hereafter.

As the proof stands, plaintiff claims the contract was entered on October 18 for employment as recovery operator, on the strength of which, he claims, he moved from Alabama to California. The claim is rebuffed by his own admissions and other proof that there was no definite agreement in any respect on or before that date. The most that can be said is that there were discussions or negotiations looking toward possible employment. The climax of those discussions was never reached and an indispensable element of an employment contract, i.e., the mutual assent to the particular job, was never provided. An employment contract unrelated to a particular job is meaningless. That major uncertainty should dispose of the case as such a contract is too vague and indefinite for the law to recognize it and give damages for a breach.

III. Liability of Defendant Was Discharged by Plaintiff's Rejection of an Offer of Performance.

No liability can attach where a promisee refuses a promisor's offer to perform. Whatever liability may have existed prior to that time is discharged. California Civil Code, Sec.

1485, et seq., *Flickinger v. Heck,* 187 C. 111, 115, 200 P. 1045. Plaintiff herein was offered a job in the new plant, but, with knowledge of the fact that he was retained at the Antioch Division only on a temporary basis until it was determined whether he could be used at the new plant, he told the department head who offered him the job that he was already employed at a higher wage. Whether plaintiff took this peculiar action in an attempt to dicker for a higher wage rate or in an attempt to obtain the offered job for his brother-in-law is uncertain. The important thing about the transaction is that the job was offered to plaintiff and his response amounted to an outright rejection of the offer. (See 106-7 in addition to references above (p. 10) on this matter.)

Since the proof shows that the contract upon which plaintiff sues was not for the job which he alleged it to be, the most that it could have been was for any job which was available. Such a job was offered to him; he had done it on a temporary basis a few weeks earlier and admitted he was competent to perform it (111-112). His rejection of the offer discharged any obligation owing to him.

IV. The Alleged Contract Was Unenforceable for Lack of Mutuality.

A contract containing an unconditional right of one party to terminate and cancel it at any time is lacking in mutuality and is not binding upon the other party. The principle has been applied by California courts in *Chas. Brown & Sons v. White Lunch Co.,* 92 C.A. 457, 461, 268 P. 490; *County of Alameda v. Ross,* 32 C.A.2d 135, 145, 89 P.2d 460, and *Fabbro v. Dardi & Co.,* 93 C.A.2d 247, 251, 209 P.2d 91.

In a recent case the defendant was obligated under a purported contract to pay the plaintiff $100 per week for six months and in return received the exclusive services of the plaintiff for acting, modeling and other commercial appearances, but the plaintiff was not obligated to accept any engagements. The contract was held to be unenforceable due to lack of mutuality. *Weston v. Kaplan,* 82 C.A.2d 390, 186 P.2d 162. Plaintiff herein brought his case within the rule of the *Weston* case by his testimony that he was entitled under the contract to quit at any time.

By reserving the right to end the agreement at any time plaintiff made the contract effective only at his will. He was not required to work permanently or for a reasonable time or even until he gave notice (97-99). Nothing in the alleged agreement upon which he sues required him either to report for work in the first instance or to work a single day thereafter. The choice was entirely and unconditionally his. According to the plaintiff a permanent job was offered him, but in return he gave the defendant only the illusory promise that he would work as long as he desired. Such an agreement is not binding on either party.

The question of consideration and the question of mutuality are sometimes confused, but the *Weston* case illustrates the distinction. The plaintiff in that case gave consideration for the agreement, for she suffered a detriment in giving the defendant an exclusive agency for her commercial appearances. Despite that consideration no valid contract was entered because the plaintiff could still refuse to do any work.

The matter of mutuality of obligation is also clearly distinguishable from mutuality of remedy. The latter is a

peculiarly equitable doctrine applicable in cases where specific performance is sought. Mutuality of obligation on the other hand is a fundamental doctrine of contract law in determining whether a valid contract exists.

The *Weston* case illustrates that mutuality is just as important to contracts of employment as it is to contracts for the sale of goods such as were involved in the *Brown* and *Fabbro* cases.

Only one additional point need be made here, that is, that part performance has no effect upon the doctrine of mutuality of obligation. This is established by the *Fabbro* and *Brown* cases. As stated in the *Fabbro* case, page 251:

> "Mutuality is absent when one party to a contract reserves an absolute right to cancel or terminate it at any time. * * * The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be binding upon the parties only to the extent it has been performed."

Despite the fact that one party may have done some act bargained for, where he assumes no burden to render services for any other time that he chooses, mutuality is lacking and the contract is not binding on the defendant. If services have been performed, liability extends only to that extent and there is no liability for a breach of contract.

In this case plaintiff was promised at most a temporary job. He was employed in such a job and was fully paid for it. No obligation existed beyond that.

V. The Alleged Contract Was Unenforceable as It Was Terminable at the Will of Either Party.

An employment having no specified term may be terminated at any time by either the employer or the employee on notice to the other. *California Labor Code,* Sec. 2922; *Thacker v. American Foundry,* 78 C.A.2d 76, 84, 177 P.2d 322; *Mile v. California Growers Wineries, Inc.,* 45 C.A.2d 674, 679, 114 P.2d 651; *Adkins v. Model Laundry Co.,* 92 C.A. 575, 581; 268 P. 939; *Lord v. Goldberg,* 81 C. 596, 22 P. 1126.

The District Court found that plaintiff had a contract for "permanent" employment, but that description does not affect the application of the general rule, for "permanent" means an indefinite term. *Speegle v. Board of Fire Underwriters,* 29 C.2d 34, 39; 172 P.2d 867. A contract for permanent employment is only a contract for an indefinite period, terminable at the will of either party, unless it is based on some consideration other than the services to be rendered.

The District Court apparently believed that plaintiff's case fell within the exception from the above rule on the ground that he furnished some consideration for this alleged contract. In the Order for Judgment the cases of *Millsap v. National Funding Corp.,* 57 C.A.2d 772, 135 P.2d 407, and *Seifert v. Arnold Bros., Inc.,* 138 C.A. 324, 31 P.2d 1059, are referred to. The Court mentions that plaintiff quit a job in Alabama and moved to California. Presumably that was believed to be consideration.

The *Millsap* and *Seifert* cases, however, do not govern this action. In the first place plaintiff quit a temporary job which was about to end (Deposition of Utley, Question 18,

p. 24, and Answer 18, p. 26, Questions 21 and 22, p. 24, and Answers 21 and 22, p. 27). In the *Thacker* case, which discussed the *Millsap* case at some length, it was pointed out that no such prejudice has been suffered where a temporary job is left sufficient to afford consideration to support a contract for the continuance of employment for any particular period of time. Secondly, the principal of the *Seifert* and *Millsap* cases is limited, as stated in the *Thacker* case at pages 83 to 85, to those factual situations where there is an *express* declaration or understanding between the parties that plaintiff would not give up present employment or other things of value unless defendant agreed to employ him permanently. No express declaration that plaintiff would take a job only on certain terms was proved in this case.

The element of consideration mentioned in the Findings was the movement of plaintiff from Alabama to California. An examination of the evidence shows that defendant did not ask for or induce the plaintiff's removal to California. At the time plaintiff and Mr. Lindley discussed the possibility of employment at Antioch the plant was not expected to begin operations for about 4½ months. This was repeated to the plaintiff in the letter of October 19, which made plaintiff's migration a matter of his personal "desire." The letter referred to the subject of his discussions with Lindley as "possibility of employment." In view of the fact that the final communication between the parties prior to the plaintiff's exodus to California placed him on notice that, as far as the prospective employer was concerned, the employment existed only in the realm of *possibility,* the finding that plaintiff's unexpected and sudden removal to

California was induced by or contemplated by the defendant as the *quid pro quo* of an agreement to employ him permanently is plainly contrary to the evidence. Defendant held out the hope for temporary work only and that was furnished for a period of more than 8 months.

If this alleged contract was, as we urge, terminable at the will of either party, on the grounds stated above, it is immaterial whether it was written or oral, for no liability can attach. If, however, this Court finds that the agreement was not terminable at the will of either party, then the section of this brief immediately following is of supervening importance. Its place near the end is not to be mistaken as an indication of a lack of importance.

VI. The Alleged Contract Is Not Enforceable Under the Statute of Frauds.

A contract for permanent employment has been found by the District Court to be a contract for a reasonable period and a reasonable period is stated to be two years. The finding was based on the *Millsap* decision that "permanent" means two years when there is good consideration for a contract of employment. As discussed above, the *Millsap* case is an exception to the rule that contracts for an indefinite period are terminable at will. The exception is not applicable here, but we do not argue with the theory established in that case that permanent employment means two years where the contract is not terminable at will. Since permanent employment means two years, a contract purporting to be for permanent employment falls within the first provision of the California statute of frauds:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writ-

ing and subscribed by the party to be charged or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof; * * *." (California Civil Code, Sec. 1624.)

The Federal Courts, where the statute of frauds is involved, look to the law of the state of the forum and if thereby a statute is held to be procedural and remedial, it is controlling. *Levi v. Murrell,* 63 F.2d 670. The statute of frauds is a procedural statute in California. *O'Brien v. O'Brien,* 197 C. 577, 586, 241 P. 861. Therefore, it controls this case.

In order to satisfy the requirements of the statute, plaintiff's alleged contract must have been performable within one year from October 19, 1948, or must be the subject of a sufficient memorandum signed by the party to be charged.

In considering the time element it must be remembered that even under plaintiff's proof the employment would not start until some 4½ months after the agreement was entered, for the plant operations were not contemplated to begin until March. Under California law the measurement of one year begins the day after the execution of the agreement. An employment commencing seven days subsequent to the making of an oral contract and extending one year thereafter has been held within subdivision 1 of the statute. *Kraft v. Rooke,* 103 C.A. 552, 284 P. 935. Therefore plaintiff's contract for employment for two years had to be performable within the 7½ months remaining after the contemplated opening of the plant in the first part of March in order to exempt it from the operation of the statute.

We may next inquire whether there is a written memorandum sufficient to satisfy the requirements of the statute. The writing must contain the terms and conditions of the promises constituting the contract and recovery may not be predicated on parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with and in no way tends to vary or contradict the written instruments. *Ellis v. Klaff,* 96 C.A.2d 471, 476-7, 216 P.2d 15.

Although the District Court found this alleged contract to be "oral and written," whatever oral elements were referred to must be ignored in determining whether or not there is a memorandum adequate to satisfy the statute. A writing which purports to be a memorial of an agreement within the statute must contain its essential terms and its material elements without recourse to parol evidence of the intention of the parties. *Salomon v. Cooper,* 98 C.A. 2d 521, 220 P.2d 774, which follows the older case of *Dillingham v. Dahlgren,* 52 C.A. 322, 198 P. 832.

Plaintiff's testimony of his telephone conversations with Mr. Lindley cannot be mixed with the written documents to prove a written contract. Where written documents signed by the parties do not purport to evidence the whole agreement and other terms are arrived at orally, the contract is in legal effect an oral contract. *California Employment Stabilization Commission v. Matcovich,* 74 C.A.2d 398, 401, 168 P.2d 702. A contract partly in writing and partly oral is in legal effect an oral contract; it occurs where an incomplete writing or one expressing only a part of what is meant is by words rounded into a full contract. *Laughlin v. Haberfeld,* 72 C.A.2d 780, 785, 165 P.2d 544. In considering whether

a contract exists, parol evidence may be used. However, where the statute of frauds is involved, parol evidence may not be considered, even if admitted without objection, to furnish the terms of a written agreement. *Ellis v. Klaff,* 96 C.A.2d 471, 476-8, 216 P.2d 15.

Considering the only writings out of which a written agreement may be developed, plaintiff's exhibits 1, 2 and 3 and defendant's exhibits A and B, it is impossible to determine the job which it is claimed was the subject of the contract. The final writing, Lindley's letter of October 19, can be interpreted only to mean that the terms of employment had not been reached. Certainly a letter which has as its subject "possibility of employment" and fails to mention any particular job is not sufficiently definite and certain to satisfy the requirements of the statute of frauds.

It may be that the District Court considered that the plaintiff's move from Alabama to California somehow exempted this alleged contract from the operation of the statute. The cases do not support that conclusion. In a similar situation it has been held that an oral agreement for an actor's engagement, made with a producer while the actor was still performing in another state, for services for one year in California if he would remove there is within the statute of frauds. *Standing v. Morosco,* 43 C.A. 244, 185 P. 954. The fact that the plaintiff in that case migrated from one state to another was ineffectual to prevent the operation of the statute.

It has been recently held that an oral agreement of employment for five years is invalid under the statute of frauds and part performance does not cure the invalidity. *Brockman v. Lane,* 103 C.A.2d 802, 805, 230 P.2d 369. In

another very recent case, decided by the California Supreme Court, it was held that, despite the fact that an employee had given up a permanent position and had entered upon and worked for a substantial period pursuant to an oral agreement for employment for a term of five years, the employer was not estopped to raise the statute of frauds as a defense and the contract was invalid and unenforceable. *Ruinello v. Murray,* 36 C.2d 687, 227 P. 2d 251.

Since the writings in this case do not show the job which was the subject of the contract and plainly prove that the parties were still negotiating without having reached a mutual understanding, they are insufficient to make out the essentials of a contract. Mixing writings and oral discussions produces at most merely an oral contract, voidable at the election of either party. *Souza v. First California Co.,* 101 C.A.2d 533, 225 P.2d 955. If the mixture were any contract it was oral in legal cognizance and within the statute of frauds. Each party accepted the risk that the other may withdraw and no liability attaches when one does withdraw, whether it be before or after performance is entered upon. Considering the written material alone, it is clear that no agreement to hire plaintiff as a recovery operator was ever reached.

CONCLUSION

It is submitted that the judgment should be reversed. Since all the pertinent facts are before the Court, it is further submitted that the District Court should be directed to enter judgment for defendant for its costs of suit.

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Respectfully submitted,

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